No. 88-1358

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In the Supreme Court of the United States

October Term, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DEGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT CENTRAL ILLINOIS PUBLIC SERVICE COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of Illinois has actively supervised its clearly articulated policy in favor of the avoidance of duplicative electric utility facilities through the authorization of territorial agreements, such as the one between Central Illinois Public Service Company and Rural Electric Convenience Cooperative, by supervising the entry of those agreements and by retaining jurisdiction to resolve any disputes that may arise under those agreements.

2. Whether a not-for-profit electric cooperative may establish state action immunity from the federal antitrust laws without a showing of active supervision under the rationale of this Court's decision in *Town of Hallie v. City of Eau Claire.*

STATEMENT PURSUANT TO RULE 21.1(b)

The caption of this case in this Court lists all parties to the proceeding in the Court of Appeals below.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 858 F.2d 1210 and is reproduced in the Appendix to the Petition at p. A-1. The opinion order of the District Court is reported at 672 F.Supp. 1111 and is reproduced in the Appendix to the Petition at p. B-1. The supplemental orders of the District Court are unreported and are reproduced in the Appendix to the Petition at pp. C-1, D-1 and E-1.

JURISDICTION

Petitioners have applied for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1254(1) after the petitioners' petition for rehearing and rehearing *in banc* was denied on November 17, 1988.

STATUTES INVOLVED

Illinois Public Utilities Act, Ill. Ann. Stat. ch. 111 2/3, § 1-101 *et seq.* (Smith-Hurd 1985):

> § 3-104. . . . "Public utility" does not include . . . electric cooperatives as defined in Section 3-119 . . .
>
> § 3-119. "Electric cooperative" is any cooperative which is subject to the Electric Suppliers Act. . . .
>
> § 4-101. The [Illinois Commerce] Commission shall have general supervision over all public utilities . . . It shall keep informed as to their . . . rates and other charges . . .
>
> § 9-201(a). . . . no change shall be made by a public utility in any rate or other charge or classification . . . except after 45 days' notice to the Commission . . .

Illinois Electric Supplier Act, Ill. Ann. Stat. ch. 111 2/3, § 401 *et seq.* (Smith-Hurd 1985):

> § 402. The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service.
>
> § 403.5. "Electric Supplier" or "Supplier" means an electric cooperative or a public utility which furnishes electric service.
>
> § 403.17. "Service area" means that area, defined in an agreement between electric suppliers, which has been

approved by the Commission, in which an electric supplier is entitled to furnish service, as provided in Section 6.

§ 405. . . . Except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, no electric supplier may construct new lines, or extend existing lines, to furnish electric service to a customer or his premises which another electric supplier is entitled to serve, as provided in this Section, except with the written consent of such other electric supplier subject to the approval of the Commission as to such consent, if required.

§ 406. Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the Commission.

§ 407. Except as otherwise provided in this Act, . . . no electric supplier may make an extension of existing lines or construct new lines for the purpose of furnishing service to a customer or premises which it is not entitled to serve under Section 5, or furnish service to any customer or premises which such supplier is not entitled to serve under Section 5, unless in any such case such electric supplier gives written notice to the electric supplier or suppliers which may be adversely affected by the proposed construction, extension or service. . . .

§ 408. When a complaint has been filed as provided in Section 7, the Commission shall proceed, after reasonable notice to the suppliers concerned, to a hearing to determine which of the suppliers is entitled or should be permitted under this Act to furnish the proposed service. . . . The Commission shall then make its determination as to which supplier is entitled or should be permitted under this Act to furnish the proposed service. In making this determination, the Commission shall act in the public interest and shall give substantial weight to the consideration as to which supplier had existing lines in proximity to the premises proposed to be served, provided such lines are adequate. In addition, the Commission may consider, but with lesser weight, (a) the customer's preference as to

which supplier should furnish the proposed service, (b) which supplier was first furnishing service in the area, (c) the extent to which each supplier assisted in creating the demand for the proposed service, and (d) which supplier can furnish the proposed service with the smaller amount of additional investment. . . .

§ 409. (a) Any customer receiving service from any electric supplier, which is not subject to the Public Utilities Act, who contends that he is not receiving adequate service from that supplier, or who contends that he is being discriminated against by that supplier, may complain to the Commission. . . .

§ 410. The Commission shall make and adopt such reasonable rules and regulations as are necessary to enforce compliance with and to administer the provisions of this Act.

§ 411. The Commission shall have the power and jurisdiction to, and shall, enforce compliance with this Act . . .

Sherman Act § 1, 15 U.S.C. § 1:

Every contract, combination or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

Over twenty years ago, the Illinois Legislature enacted the Electric Supplier Act, Ill. Ann. Stat. ch. 111 2/3, § 401 *et seq.* (hereinafter the "ESA") (Smith-Hurd 1985). The express purpose of the ESA was to avoid the duplication of facilities that would result from electric suppliers competing for the right to serve the same customer as well as the inconvenience and inefficiency that such multiple service would cause. ESA § 402. To address this purpose, the ESA limited electric suppliers such as respondents Central Illinois Public Service Company ("CIPS") and Rural Electric Convenience Cooperative, Inc. ("RECC") to serving their existing customers from their existing distribution lines. ESA § 405. In order to serve any new customer, the ESA required electric suppliers to enter agreements among themselves, subject to the approval of the Illinois Commerce Commission (the "ICC"), delineating their service boundaries and governing which electric supplier would extend service to which new customers. In the absence of an agreement, the ESA provided that service to new customers would be allocated by the ICC on a case-by-case basis. ESA §§ 406-408; Appellate Opinion, 858 F.2d at 1212.

In compliance with the requirements of the ESA, on February 19, 1968, CIPS and RECC entered into a contract establishing their respective service territories (the "Agreement") and submitted the Agreement to the ICC for approval on February 27, 1969. On April 29, 1969, the ICC issued its approval, finding that the Agreement was both in the public interest and in conformance with the requirements of the ESA. 858 F.2d at 1212. The Agreement contains no mention of the rates either party will charge its respective customers; CIPS' rates are strictly regulated by the ICC, and RECC's rates are confined by its own by-laws and its federal mandate to the sum of its costs of operation. Illinois Public Utilities Act, Ill. Ann. Stat. ch. 111 2/3, § 4-101 and § 9-201 (hereinafter the "PUA") (Smith-Hurd 1985); 858 F.2d at 1217. Indeed, petitioners

have never asserted that CIPS entered any agreement with RECC to fix prices. The sole basis of the claims asserted against CIPS resides in the service area agreement authorized by the ESA and approved by the ICC.

The petitioners, who reside within the RECC service territory, are owner-members of the RECC. Until very recently, they enjoyed utility rates lower than their "neighbors" in CIPS' territory. Circumstances changed, however, as the RECC's non-profit rates began to reflect the mounting debt associated with RECC's participation in the Clinton nuclear power facility and the capital costs of building its electric distribution facilities. 858 F.2d at 1211 n.2; 858 F.2d at 1212-1213 n.8. At the time of suit, the petitioners sought to escape the relatively higher RECC rates by challenging the agreement allocating service territories between RECC and CIPS. They alleged in their Complaint that but for the Agreement, they could obtain electricity from CIPS. Their allegations assume that CIPS would find it economical to extend its facilities to serve them and further assume that the ICC would issue a certificate of convenience to permit CIPS to render such service. 858 F.2d at 1212 n.7.

The District Court granted the respondents' motions to dismiss and for summary judgment on the basis of the state action doctrine first articluated by this Court in *Parker v. Brown,* 317 U.S. 341 (1943). The merits of petitioners' underlying claim were not placed in issue by those motions or the District Court's decision. CIPS has consistently maintained that even in the absence of state action immunity petitioners have no cause of action under the antitrust laws.

The Court of Appeals for the Seventh Circuit unanimously affirmed the decision of the District Court. The Court of Appeals held that the rationale of this Court's decision in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985), stating that the active supervision requirement serves only an evidentiary

function to insure against purely private price fixing, applies equally to municipalities and other public entities, such as RECC, which lack the motivation to enter private price fixing agreements. Most importantly as it relates to CIPS, the Court of Appeals found that, "[a]s to CIPS, therefore, the challenged restraint is clearly articulated and the 'policy' actively supervised within the meaning of *Midcal.*" 858 F.2d at 1218.

Hence, contrary to petitioners' assertion, the Court of Appeals did not implicitly recognize that the active supervision element of the state action doctrine required price supervision of the RECC's rates. At least as it relates to CIPS, the Court of Appeals found that all of the traditional state action principles had been satisfied.

REASONS FOR DENYING THE WRIT

I. There is No Basis for a Writ to Review Petitioners' Claims Against Central Illinois Public Service Company

As confirmed by a review of the Petition for Certiorari, petitioners do not contest the holdings of the courts below that the challenged conduct of CIPS was pursuant to a clearly articulated state policy which was, as to CIPS, actively supervised. Rather, petitioners continue to press before this Court the argument that RECC cannot be afforded state action immunity without the State of Illinois also imposing regulation of RECC's rates to its owner-members. CIPS disagrees, as did both courts below, with petitioners' argument. Regardless of the final resolution of that question, however, this Court need not review the holding that CIPS has met all of the state action requirements. Indeed, there is no dispute that every aspect of CIPS' conduct with respect to the Agreement has been actively supervised by the State of Illinois as required by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

CIPS maintains, moreover, that whether the State of Illinois actively supervises the rates RECC charges its members is irrelevant to the state action inquiry here because the allegedly anticompetitive act in suit, the Agreement between CIPS and RECC, did not concern RECC's rates. In other words, the test of active supervision must necessarily be a function of the anticompetitive act to be supervised. This Court said no less when, following *Midcal,* it held, "the *anticompetitive conduct* 'must be "actively supervised" by the state itself.' " *Patrick v. Burget,* _____ U.S. _____, 108 S. Ct. 1658, 1663 (1988) (emphasis supplied); *see also 324 Liquor Corp. v. Duffy*, to be reported at 479 U.S. 335, 107 S.Ct. 720, 725 n.6 (1987) (suggesting that a straight minimum mark-up statute, as self enforcing, would satisfy the active supervision requirement).[1]

Stated simply, it is no failure of the state action doctrine for the state to fail to supervise that over which it has no express policy. The purpose of state action immunity is to recognize the principle of state sovereignty in our federal system. It would be anomalous indeed for a federal court to reject a state action immunity defense because the state implemented and supervised one policy, territorial agreements, but chose not to implement and supervise a second policy, regulation of electric cooperative rates. Here, the result would be even more anomalous because the State of Illinois consciously made the decision not to regulate the rates of electric cooperatives.[2]

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[1] Professors Areeda and Hovenkamp have suggested that even though such a statute would result in the elimination of price competition, that result would satisfy *Midcal* because it represented the choice of the state and not private actors. Areeda and Hovenkamp, *Antitrust Law,* § 212.7 at p. 146 (1987 Supp.).

[2] On the same day that the ESA was adopted, the Illinois Legislature amended the Illinois Public Utilities Act to exclude electric cooperatives from the definition of a public utility under that act and, thereby, from ICC rate regulation. PUA § 3-104.

A territorial agreement, such as the one in suit, is essentially self-enforcing. Consequently, the sole state action concern is whether the state actively supervised the implementation of, and the conduct of the parties pursuant to, that Agreement. The ESA provides the required supervision. As the Court below explained, "Under the ESA, the ICC approves the agreement, resolves all disputes under it, and has the power to enforce compliance with its rulings. ESA §§ 407-416." 858 F.2d at 1218.

In the context of peer review cases, this Court has recently held that state review of the peer committee's decision alone meets the active supervision standard. *Patrick,* 108 S.Ct. at 1663-65. Territorial divisions are essentially the same as peer review determinations in that they constitute single decisions, single acts, for which there can be only one primary act of review, at the time the agreement is proposed and the territorial borders established. Here, however, the State of Illinois went further and provided for continuing oversight to resolve any potential disputes concerning the boundaries created by the Agreement.

The active supervision element of the state action doctrine requires no more. There is no cause to reconsider the panel's decision affirming the dismissal of petitioners' Complaint against CIPS.

II. The Court of Appeals' Rationale Is Neither Novel Nor in Conflict With the Decisions of This Court.

In *Town of Hallie,* this Court acknowledged that the active supervision prong of the *Midcal* test did not comport with the realities of local government and the supply of services, such as sewage collection and treatment, to local populations. In *Town of Hallie,* this Court did not simply state that municipalities were henceforth absolved from the active supervision requirement of *Midcal.* Rather, this Court held that the active supervision requirement:

> serves essentially an *evidentiary function:* it is *one way* of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. . . . Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Town of Hallie, 471 U.S. at 46-47 (emphasis supplied).

The rationale of this decision was not limited to traditional municipalities. Instead, the Court's decision acknowledged that there may be alternate, yet equally persuasive, evidence of conformity with a state's articulated policy sufficient to render the active supervision inquiry unnecessary. The Court did not foreclose the application of the *Town of Hallie* rationale in appropriate cases, such as this one.

In fact, it is far from novel to see the rationale of *Town of Hallie* applied outside the traditional municipality context. The Court of Appeals' opinion relied on the thoughtful analysis of three other circuits in which the *Town of Hallie* decision was held to justify state action immunity for "hybrid" entities: *Interface Group, Inc. v. Massachusetts Port Auth.,* 816 F.2d 9, 13 (1st Cir. 1987) (the airport authority resembled or "was equivalent to" a municipality); *Ambulance Serv. of Reno v. Nevada Ambulance Serv.,* 819 F.2d 910, 913 (9th Cir. 1987) (the ambulance service was "much closer to" a municipality); and *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.,* 801 F.2d 1286, 1290 (11th Cir. 1986) (the aviation authority was "analogous to a municipality").

The Court of Appeals found that RECC, like the entities in those cases, falls somewhere between a municipality and a

purely private entity, and concluded that RECC, too, should be considered under the *Town of Hallie* standard. Contrary to petitioners' purportedly scientific analysis of those cases, not one was decided explicitly on principles of municipal corporation law; they were each decided on a common sense analysis by the individual courts, using principles of analogy and relationship common to all areas of judicial endeavor. *E.g., Lancaster Community Hosp. v. Antelope Valley Hosp. Medical Center,* 1988-1 Trade Cas. (CCH) ¶ 67,933 at 57,733 (C.D. Ca. 1988) ("Courts constantly analogize to cases similar, but not identical, to the case before them. The authority cited above [including *Interface*] is substantially similar to the present case and the Court finds it persuasive [that a hospital district qualif[ies] as a municipality eligible for immunity.]").

The realities of electric cooperative operation, moreover, indicate the presence of the same kinds of factors that fueled the decision in *Town of Hallie* and the subsequent decisions on which the panel relied. For example, RECC, like a municipality, has the power of eminent domain, is controlled by its members, each of whom have a vote to cast in electing its management board, and has the public motivation of advancing its members' welfare instead of being motivated by a profit incentive. In fact, the RECC is strictly non-profit; any excess charges it collects are returned to its members. Thus, the panel below correctly determined that as to RECC, there was no need to search for the active supervision of the State of Illinois' policy not to regulate RECC's rates to its members as part of its supervision of RECC's agreement with CIPS.

Neither does the decision below "virtually nullify the active supervision requirement" as the petitioners maintain. Petition For a Writ of Certiorari at 5. The active supervision requirement, as described by the prior decisions of this Court, serves as an evidentiary standard, the application of which depends on the facts before the court. If a court is satisfied that

the facts do not suggest the motivation for private price fixing, as in the case of municipalities, and other non-private, non-profit entities such as RECC, there is no need to require active supervision to prevent an activity that the court has already determined will not occur. Here, there is no private party that can benefit from unfettered private price fixing; CIPS' rates are regulated and RECC's rates are capped by its non-profit pricing formula. No amount of added supervision of RECC's non-profit rates will make any difference from an antitrust perspective.

Petitioners' inability to comprehend the *Town of Hallie* evidentiary standard becomes most obvious when they suggest that a public utility, such as CIPS, could satisfy the *Town of Hallie* rationale as applied below. Petition for a Writ of Certiorari at 7-8. The panel's decision did not go so far. Indeed, since a public utility, owned by private investors, seeks pecuniary gain, it would not satisfy the standard articulated by the Court below. The Court below required more than the provision of a public service to meet the *Town of Hallie* rationale. Only public entities, in terms of their focus on delivering public benefit to their constituents or members, i.e., non-profit motivations, pursuing a clearly articulated state policy, may come within the *Town of Hallie* rationale.

Finally, the lower courts' decisions did not create a blanket exemption from the antitrust laws for non-profit or cooperative organizations as if such organizations were the state itself. *Hoover v. Ronwin,* 466 U.S. 558, 569 (1984). The petitioners' argument that the lower courts' opinions overturned well-settled precedent for holding cooperatives and non-profit organizations subject to liability under the federal antitrust laws overlooks the one fact, aptly explained by the Court of Appeals, that distinguishes this case from the honor-roll of decisions to which petitioners refer:

> There is no question that RECC and CIPS entered into, and the ICC approved, the service area agree-

> ment pursuant to "a clearly articulated and affirmatively expressed policy to displace competition." As the district court stated, one could hardly envision a statutory scheme that evinces a clearer, more affirmative intent.

858 F.2d at 1216; *see also* 858 F.2d at 1214 n.10. The decisions below did no more than recognize the principles of federalism that this Court announced over forty years ago in *Parker v. Brown;* they did not rewrite the state action exemption to the antitrust laws.

CONCLUSION

For the reasons stated, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. In particular, there is no justification, and no request, to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit with respect to defendant CIPS. The application should be denied.

Respectfully submitted,

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